No. 84-68

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

KERR-McGEE CORPORATION,

Petitioner,

v.

NAVAJO TRIBE OF INDIANS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE PEABODY COAL COMPANY

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Peabody Coal Company respectfully submits this brief as amicus curiae in support of the position of petitioner Kerr-McGee Corporation. Counsel for petitioner and respondent have given their written consent for the filing of this brief. Such written consent has been filed with the Court.

INTEREST OF AMICUS CURIAE

Peabody Coal Company (hereafter referred to as Peabody), is a successor in interest under various Leases with both the Navajo and Hopi Tribes. Peabody obtained the right to mine coal from portions of the Navajo Indian Reservation in Arizona, including mining areas within the joint use area of both the Navajo and Hopi Tribes by Assignments of certain Leases approved in 1968. Over the years it has been mining coal on the Reservation, Peabody has paid approximately $35,000,000 in advance and production royalties.

Peabody is the beneficiary of a contractual arrangement between the Navajo Tribe and the Salt River Project Agricultural Improvement and Power District as managing agent of the Navajo Project. The Navajo Tribe had agreed not to tax the Navajo Project owners and Peabody Coal Company as part of the contractual arrangement. With that agreement now in doubt, the extensive investment by Peabody on the Reservation [1] could be irreparably impaired by the unregulated and unfettered exercise of the power of taxation by the Navajo Tribe in an essential industry such as coal production.

As coal production has gained momentum as a significant energy resource, and given the extensive federal involvement and regulation in the industry, Peabody, both for itself and others including ultimate consumers of energy, has an essential interest in this case arising out of the havoc unsupervised exaction of taxes by the Tribe can create.

STATUTORY PROVISION INVOLVED

1. United States Code Annotated, Title 25, §640d-6:

Partition of the surface of the lands of the joint use area shall not affect the joint ownership status of the coal, oil, gas, and all other minerals within or underlying such lands.

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[1] For State of Arizona ad valorem property tax purposes, the full cash value for the Kayenta and Black Mesa mines of Peabody have totalled approximately $100,000,000.

All such coal, oil, gas, and other minerals within or underlying such lands shall be managed jointly by the two tribes, subject to supervision and approval by the Secretary as otherwise required by law, and the proceeds therefrom shall be divided between the tribes, share and share alike.

SUMMARY OF ARGUMENT

The Navajo Tribe is a domestic dependent nation or a quasi-sovereign. With such status, the Tribe is faced with limits on the exercise of its powers. One such a limitation must be the establishment of boundaries on the Tribe's power to tax. Far from being a matter related to the right to govern itself, or the exercise of power over members and its territory, the attempted exercise by the Navajo Tribe of the power to tax is an effort to create the equivalent of long-arm jurisdiction reaching out far beyond Reservation boundaries.

The absence of federal supervision over tribal taxing power leaves Peabody without a remedy. With rights for the non-Indian having been stripped away one by one, the exercise of federal supervision is essential to the orderly administration of the Navajo Tribe's proposed taxes. This is particularly so in this case, for the Navajo Tribe's proposed taxes transcend internal affairs and reach out with external impact beyond the Reservation.

ARGUMENT

I. TRIBES ARE NOT INDEPENDENT SOVEREIGN ENTITIES ENTITLED TO EXERCISE POWERS ATTRIBUTABLE TO INDEPENDENT NATIONS.

A tribal government characteristic that must be recognized as Indian law jurisprudence develops is that tribes are something less than independent sovereign entities. The exercise of power by an entity that is less than an independent sovereign must necessarily be of a limited nature. The power of a tribe cannot be the equivalent of an independent sovereign nation.

One striking example of the limited nature of tribal sovereignty is found in *United States of America v. United States Fidelity and Guaranty Company*, 309 U.S. 506 (1940), wherein it was determined that a tribe did not possess the power to waive its own sovereign immunity. Thus, as stated in *United States v. Wheeler*, 435 U.S. 313 (1978), the sovereignty retained by tribes is both of a unique and limited character. "Unique" does not have to mean extensive and completely independent. Rather, the unique nature of the sovereignty is its limited character. This Court in *Wheeler* cited F. Cohen, *Handbook of Federal Indian Law*, 122 (1945), for the view that tribes no longer possess the full attributes of sovereignty. Limited sovereignty correlates with limited power or limitations upon the exercise of power.

Over the years, tribes have been characterized as domestic dependent nations, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 at 144 (1982), or as quasi-sovereign entities, *United States v. United States Fidelity and Guaranty Company, supra*, occupying a semi-independent position. *U.S. v. Kagama*, 118 U.S. 375 (1886). It naturally follows that there are limitations on the exercise of powers of sovereignty by a tribe.

As an example of such a limitation, the Jicarilla Apache Tribe was permitted, with Secretary of Interior approval, to impose a severance tax on non-members of the Tribe doing business on the Reservation. *Merrion v. Jicarilla Apache Tribe, supra.* While this was determined in the context of an Indian Reorganization Act Tribe, a limit imposed on the exercise of tribal sovereignty as to the power to tax was recognized by this Court in stating in the *Merrion* case in 455 U.S. at 141 as follows:

> "Of course, the Tribe's authority to tax non-members is subject to constraints not imposed on other governmental entities: the federal government can take away this power, and the Tribe must obtain the approval of the Secretary before any tax on non-members can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax

in an unfair or unprincipled manner, and insure that any exercise of the tribal power to tax will be consistent with national policies."

Indian tribes have never been construed as independent sovereign nations. While they are unique quasi-sovereigns, such "uniqueness" bears with it limitations on the exercise of power. Dependent or quasi-sovereign nations which cannot waive their own sovereignty must have limitations on the powers they can exercise over non-members. One such limitation as found in *Merrion* in the context of an Indian Reorganization Act Tribe is the requirement for Secretarial approval over the exercise of a right so potentially significant as the power to tax. A non-Indian Reorganization Act Tribe such as the Navajo Tribe is no less unique. Its exercise of power is no less limited. The Navajo Tribe is no less a domestic dependent quasi-sovereign than the Jicarilla Apache Tribe.

II. WITH THE EROSION AWAY OF REMEDIES FOR NON-MEMBERS OF INDIAN TRIBES, AND WITH THE PREEXISTING EXTENT OF FEDERAL INVOLVEMENT, IT IS ESSENTIAL THAT THERE BE FEDERAL SUPERVISION AS TO THE TRIBE'S EXERCISE OF THE POWER TO TAX.

There has been significant shrinkage in remedies available to non-Indians who deal with tribes. First, a non-Indian encounters a tribe's sovereign immunity defense, a defense a tribe cannot itself waive. Next, Indian governments have been found free of the restraints attributable to federal and state governments imposed by the Bill of Rights and the Constitution. See, e.g., *Talton v. Mayes*, 163 U.S. 376 (1896); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971). Then, after the enactment of the Indian Civil Rights Act, 25 U.S.C. §§1301 *et seq.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), removed any meaningful remedies available to non-Tribal members under that legislation. The result is that preexisting business relationships are now subject to the concept that businesses have no rights on the Reservation.

The prevailing situation is that businesses have been reduced to doing business with a tribe at their own risk. The sole stopgap in this development is Secretarial review.

The need for Secretarial approval can be demonstrated with a single and simple example. If it is assumed that a tribal tax is confiscatory or discriminatory, without Secretarial approval, Peabody would have no claim under the United States Constitution. Likewise, Peabody would have no claim under the Indian Civil Rights Act. Finally, Peabody would have no contract claim against the Tribe given its established sovereign immunity.[2] Absent Secretarial review and approval, Peabody would be left at the whim and caprice of a domestic dependent quasi-sovereign nation that has sovereign immunity. Absent Secretarial review and approval, Peabody would be without a remedy. Absent Secretarial review and approval, Peabody would have a lease under which it would have no rights it could enforce.

The need for Secretarial approval is emphasized by other salient points. Peabody's mines are within the joint use area for the Navajo and Hopi Tribes. In 25 U.S.C. §640d-6, Congress provided that partition of the surface of the lands of the joint use area shall not affect the joint ownership status of the coal and other minerals within such lands. This statutory provision further provided that the coal and other minerals within the joint use area must be managed jointly by the Hopi and Navajo Tribes subject to supervision and approval by the Secretary and that the proceeds therefrom must be divided between the Tribes, share and share alike. With the powers proposed by the Navajo Tribe in its taxing schemes to exclude an entity such as Peabody from the Reservation, intervention by the Secretary is essential. There is an obvious potential conflict with the Hopi Tribe under the joint management provisions of 25 U.S.C. §640d-

[2] This example does not even take into account the related problem of the United States being a necessary party to litigation involving a tribe and the consent of the United States to be sued to avoid its sovereign immunity defense.

6. Without the general supervision of the Secretary, unilateral acts by the Navajo Tribe such as the adoption of its proposed taxation scheme could obliterate the orderly joint management of resources on the Reservation within the joint use area. Similarly if the Navajo Tribe could act unilaterally in adopting a taxing scheme, that could provide the Hopi Tribe with motivation to "out-tax" the Navajo Tribe. The conflict as to the joint use area could then only accelerate. Secretarial review and approval of taxing schemes would avoid these potential problems and be harmonious with the intent of 25 U.S.C. §640d-6.

Aside from the federal involvement in the joint use aspect of the relationship between Peabody and the Navajo Tribe, the Secretary of Interior, of course, initially approved Peabody's leases. Since then, Federal involvement in Peabody's coal mining operations has been far-reaching and extensive. Without listing each element, the government has legislated in such wide-ranging areas as The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§801 *et seq.*, to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§1201 *et seq.* With the existing extent of federal involvement, it naturally follows that there should be Secretarial review and approval as to the Navajo Tribe's tax scheme, particularly when such taxes impact beyond Reservation boundaries.

The Navajo Tribe's proposed taxing scheme not only creates conflicts within Reservation boundaries, but the Tribe's tax also extends its jurisdiction beyond the Reservation. Indian Tribes possess attributes of sovereignty over their members and their territory. *United States v. Mazurie*, 419 U.S. 544 (1975). As stated in the *Mazurie* case, the power of a tribe is to regulate its internal and social relations. The proposed tax scheme by the Navajo Tribe constitutes an

exercise of power beyond the borders of its Reservation and beyond the Tribe's internal affairs.[3]

The Tribe therefore knows no limitation in the attempted exercise of its power to tax. To maintain order, effective development of resources, and to avoid conflicts both within and without the Reservation, a supervisory role is essential. With the erosion of remedies for taxpayers reduced to the non-existent, it is essential that Secretarial supervision and approval exist as a predicate to the validity of any taxing scheme.

III. CONCLUSION.

The Navajo Tribe is not an independent sovereign nation. It is unique and more restricted. It has less pervasive power than an independent nation. As a domestic dependent and quasi-sovereign entity, there are limits on its unfettered exercise of power. One of those limitations is the necessity for Secretarial approval of the enactment of tribal tax statutes and regulations.

Absent Secretarial review and approval, non-tribal members are remediless. Review and approval by the Secretary is essential to assure the absence of conflict within Reservation boundaries. Review and approval by the Secretary is essential to avoid the overzealous and overreaching exercise of

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[3] Among other taxable events, the Navajo Tribe seeks to exact taxes for sales that take place off the Reservation. Under the Tribe's scheme, if Peabody were to sell coal to a foreign country, the Tribe would claim entitlement to tax the proceeds of that sale. In short by way of such example, the Tribe would be extending its reach as a quasi-sovereign, domestic dependent nation to international relationships and contracts. This example further underscores the necessity for Secretarial review and approval.

jurisdiction by the Navajo Tribe and to prevent its exercise of quasi-sovereignty beyond internal relations, Reservation borders, and members. It is respectfully requested that the Ninth Circuit be reversed.

Respectfully submitted,

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November 1984